BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EARL BENNETT LITTLE, JR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 230,107
CATTLE EMPIRE, L.L.C.	)	
Respondent	)	
AND	)	
	)	
KANSAS LIVESTOCK ASSOCIATION	)	
Insurance Carrier	)	

ORDER

Respondent appeals from the preliminary hearing Order of Administrative Law Judge Kenneth S. Johnson dated February 12, 1998, wherein the Administrative Law Judge granted claimant temporary total disability compensation beginning December 22, 1997, and medical treatment to be paid by the respondent.

ISSUES

In its Application for Review, the respondent listed the following issues for consideration:

(1) Whether the Administrative Law Judge has exceeded his jurisdiction in ordering payment of temporary total disability benefits "until further order or until certified by the authorized treating physician as having reached maximum medical improvement; or released to regular job; or becomes re-employed, whichever comes first;"

(2) Whether the Administrative Law Judge exceeded his jurisdiction in not allowing the respondent the opportunity to present evidence, including testimony, on the disputed issues.

In addition, in its brief, respondent alleged claimant failed to prove accidental injury arising out of and in the course of his employment, claiming claimant's problems stem from an injury suffered at a prior employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

At the preliminary hearing in this matter, respondent requested permission to provide the testimony of several witnesses. The Administrative Law Judge at first objected but then relented and allowed respondent to present the testimony of three witnesses at the preliminary hearing. At the conclusion of the hearing, respondent requested an extension of time in order to take the deposition of Brent Callon. The Administrative Law Judge advised he would allow one week from the hearing date of February 3, 1998, within which the respondent could take the deposition. The Administrative Law Judge then issued his Order on February 12, 1998, nine days after the preliminary hearing.

The respondent did not take the deposition of Brent Callon or the additional deposition of Curtis Abbott until February 26,1998. Neither of those depositions were considered by the Administrative Law Judge when he issued the February 12, 1998, Order. Respondent contends the Administrative Law Judge exceeded his jurisdiction in ordering the temporary total disability compensation, in granting claimant medical treatment, and in refusing to allow the respondent the opportunity to present additional evidence on the disputed issues.

K.S.A. 44-534a allows appeals from preliminary hearings only when certain jurisdictional issues are raised. These issues include whether the employee suffered an accidental injury, whether the accidental injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made or whether certain defenses apply. The Appeals Board finds the above issues listed by respondent to not fall under those jurisdictional issues listed in K.S.A. 44-534a.

In addition, an appeal can be taken from a preliminary hearing under K.S.A. 44-551 if it is alleged that the Administrative Law Judge exceeded his or her jurisdiction in granting or denying the relief requested at preliminary hearing. Administrative Law Judges are specifically authorized to decide disputes dealing with temporary total disability compensation and medical treatment at preliminary hearing. Therefore, neither of those issues can be considered by the Appeals Board at this time.

It is the Administrative Law Judge's responsibility to manage his or her docket. In this instance, while the Administrative Law Judge grumbled about the length of time involved, he did allow respondent to provide the testimony of three additional witnesses at the preliminary hearing. He then granted respondent additional time to provide additional

testimony. The Administrative Law Judge did not issue the preliminary decision until nine days after the preliminary hearing. The Appeals Board considers docket management to be the responsibility of an Administrative Law Judge. The timing involved, including when the evidence is to be submitted and whether extensions are to be granted, are within the authority and jurisdiction of an Administrative Law Judge and the Appeals Board will not consider these issues on appeal from a preliminary hearing.

After respondent filed its Application for Review, claimant filed a Motion To Quash Application For Review alleging the issues listed in respondent's application were not jurisdictional. The Appeals Board acknowledges the issues listed specifically in the application are not jurisdictional. However, the issue regarding whether claimant suffered accidental injury arising out of and in the course of his employment, raised in respondent's brief to the Appeals Board, is jurisdictional. *See* K.S.A. 44-534a. The Appeals Board, therefore, finds claimant's Motion To Quash Application For Review should be denied.

With regard to whether claimant suffered accidental injury arising out of and in the course of his employment the Appeals Board finds as follows:

Claimant alleges accidental injury on several dates during his brief employment with respondent. By way of history, claimant suffered a serious injury in 1995 when he was run over by a truck. As a result of that accident, claimant underwent back surgery, including a fusion under the hands of Dr. Neonilo A. Tejano of the Hertzler Clinic. The fusion at L4-S1 allowed claimant to return to work with significant restrictions when he was released in April, 1997.

Claimant contacted respondent in May 1997 and applied for a job. The information regarding claimant's preexisting injury and the back surgery was well known to respondent and several discussions occurred regarding the limitations to be placed upon claimant and his ability to perform work at respondent's employment. Claimant was hired by respondent on May 29, 1997.

Claimant alleges several specific traumas while employed with respondent. The first four deal with shoveling or hauling hay and will be described individually. Claimant alleges on June 27, 1997, that he suffered injury to his back while shoveling and lifting bales of hay. He described a sharp pain in his back and left hip and experienced radiculopathy into his neck. He went to the emergency room of Satanta District Hospital in Satanta, Kansas, at 8:20 p.m. There he was examined by a physician, provided pain medication and released at 8:35 p.m. The medical record from the emergency room indicates claimant's pain resulted from lifting and shoveling at work.

Claimant alleged a second incident on June 30, 1997, while scooping with a shovel and lifting bales of hay. Claimant again went to the Satanta Emergency Room, this time at 8:19 p.m. and was examined by an emergency room physician. He described

numbness in his legs when lying down. Claimant was again provided pain medication and was discharged from the emergency room at 8:30 p.m.

Claimant next alleged an accidental injury on July 19, 1997, again attributing his symptoms to shoveling and lifting bales of hay. This time claimant appeared at the Satanta Emergency Room at 9:45 a.m. He was again treated with pain medication including Demerol and released at 10:25 a.m. The emergency room records of July 19 indicate claimant was getting out of a door and, when he stepped down, he noted pain in his left lower extremity and back. The medical records of July 19 show no work-related cause for these symptoms.

Claimant next alleged accidental injury on August 18, 1997. He appeared at the Satanta Emergency Room at 3:50 p.m., claiming he suffered symptomatology when twisting at work and lifting hay. Claimant was treated with Demerol and Phenergan, a sedative. Claimant was discharged at 7:35 p.m.

Respondent provided testimony at preliminary hearing from three respondent employees. William L. Tatman, foreman, Roy Brown, owner and manager, and Rodney Kreutzer, an employee of respondent. All of respondent's witnesses acknowledged knowing of claimant's preexisting back problems and lifting limitations. All deny claimant ever advised that he injured himself in any way while lifting bales or scooping. Mr. Brown acknowledge receiving one bill from the Satanta Hospital, but when he spoke to claimant, the bill was turned into claimant's personal health insurance. No workers compensation claim was ever filed while claimant was employed with respondent.

In reviewing the medical evidence, the Appeals Board finds claimant did suffer accidental injury on June 27, June 30, and August 18, 1997, while working for respondent. However, the employee records indicate claimant returned to work for respondent after each of these incidents with no apparent time lost.

Claimant's allegation that he suffered accidental injury on July 19, 1997, is not supported by the medical evidence in the record as the emergency room records of that date give no indication that claimant suffered any type of trauma or aggravation while at work. The Appeals Board therefore finds claimant has failed to prove accidental injury on July 19, 1997, arising out of and in the course of his employment with respondent.

Claimant alleged a final injury on November 16, 1997, when he slipped and fell while walking across wet plastic. Respondent's witnesses again controvert this injury testifying they were provided no information that this incident ever occurred. Also, the November 16, 1997, incident does not have a corresponding emergency room record. Claimant alleged that he suffered such significant injury that he was forced to leave work for the day and that his foreman, Mr. Tatman, drove him home. Mr. Tatman acknowledges taking claimant home around November 16 or 17, 1997, but testified that it was due to claimant feeling dizzy from the medication he was on for his back and not from any slip and fall. He felt it

would be unsafe for claimant to work around heavy equipment if he was dizzy and he would not let claimant work the remainder of that day. Claimant did not work again for respondent as he was terminated on November 20, 1997, for poor attendance. Claimant returned to respondent on November 21, 1997, requesting that he be returned to his job and at the same time submitted written claim to respondent for the above alleged injuries.

On November 21, 1997, claimant was re-examined by Dr. Tejano. Dr. Tejano's history indicates claimant fell on Sunday, November 16, 1997, when claimant was walking across a pile of tires. At the preliminary hearing, claimant testified that he did not fall on November 16 but instead fell on Monday, November 17, 1997. Respondent representatives testified that no such incident occurred. Dr. Tejano's examination of claimant on November 21, 1997, found spasms in claimant's back, bilateral leg pain, complaints of pain from the neck to the low back and headaches. Dr. Tejano noted that the fusion that he had performed in 1995 at L4-S1 was solid, although there was some evidence of spondylolysis at L5. Dr. Tejano recommended pain medication and heat treatment.

Claimant was examined by Dr. Gary M. Kramer, an orthopedic surgeon with the Garden City Medical Clinic, on January 21, 1998. At that time, Dr. Kramer was advised by claimant that he suffered injury in November 1997 while lifting. No history of a slip and fall was provided to Dr. Kramer during his examination of claimant. In addition, Dr. Kramer found that the lumbar fusion performed by Dr. Tejano had failed.

The E-1 Application for Hearing filed by claimant in December 1997 lists five dates of accident and includes shoveling feed, moving bales of hay, and moving tires as being the precipitating event for the first four dates of accident. It alleges slipping on a pile of tires being the precipitating event listed for the November 16, 1997, date of accident. The Order by the Administrative Law Judge gives no indication regarding whether the temporary total disability and medical treatment were ordered for the earlier dates of accident or from the November 1997 incident.

As claimant returned to his regular employment with no limitations after the first four incidents the Appeals Board can only assume the temporary total disability compensation and medical treatment were ordered as a result of the November slip and fall.

In considering the evidence in the record, including the testimony of claimant and the various witnesses provided by respondent, the Appeals Board cannot find that claimant suffered accidental injury arising out of and in the course of his employment on either November 16 or November 17, 1997. There is no emergency room record indicating such an incident occurred as was the case with the first four injury dates. Dr. Tejano was told the incident occurred on Sunday while claimant testified the incident actually occurred on Monday, Dr. Kramer's history indicates claimant suffered injury while lifting. Claimant, however, testified to a slip and fall. The witnesses for respondent deny such an incident ever occurred. The Appeals Board finds, based upon the evidence, that claimant has

failed to prove accidental injury arising out of and in the course of his employment on November 16 or 17, 1997, and the Order of the Administrative Law Judge should be reversed. This finding renders Issue #1 moot.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Kenneth S. Johnson dated February 12, 1998, should be, and is hereby, reversed as claimant has failed to prove accidental injury arising out of and in the course of his employment on November 16, 1997.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

c: Robert A. Anderson, Ellinwood, KS
D. Shane Bangerter, Dodge City, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director